Supreme Court, U.S.
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No. 91-756

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FRANK L. WHITMER and JOAN P. WHITMER,
Petitioners,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., SKIDMORE, OWINGS AND MERRILL, SUDLER AND CO., SUDLER MARLING, INC., TISHMAN CONSTRUCTION CO., ALUMINUM COMPANY OF AMERICA, ADMIRAL HEATING AND VENTILATING, INC., R.B. HAYWARD CO., UNIVERSAL SHEET METAL CORP. d/b/a UNIVERSAL-HAYWARD, CUPPLES PRODUCTS CORPORATION, a DIVISION OF H.H. ROBERTSON CO., H.H. ROBERTSON CO., 175 EAST DELAWARE PLACE HOMEOWNERS ASSOCIATION, H.S. NACHMAN AND ASSOCIATES, INC., ENVIRONMENTAL SYSTEMS DESIGN, INC., L.C. KOHLMAN, INC., GENERAL PARKING CORPORATION, WILSON & McILVAINE, CITY OF CHICAGO, and DOES 1-50 INCLUSIVE,
Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether there is a conflict among the U.S. Courts of Appeals on the question of whether a Court of Appeals is authorized to dismiss an appeal for want of prosecution due to an appellant's failure to timely file its brief, where all of the U.S. Courts of Appeals that have addressed this issue have held that such a dismissal is proper.

Whether the United States Court of Appeals for the Seventh Circuit properly followed its own Circuit Rule 31(c)(2) prior to dismissing the Petitioners' appeal for want of prosecution.

LIST OF PARTIES

Respondents John Hancock Mutual Life Insurance Company, Sudler and Company, n/k/a Sudler Marling, Inc., and General Parking Corporation are the same parties as those listed in the caption to the Petitioners' Petition.

Respondent John Hancock Mutual Life Insurance Company states, pursuant to U.S. Supreme Court Rule 29.1, that it has the following non-wholly owned subsidiaries:

John Hancock Services Internacionsis S/C Limitada

John Hancock International Services, S.A.

The Maritime Life Assurance Co.

John Hancock International Services (Hong Kong) Ltd.

Nahama & Weagant Energy Co.

P.T. Asuransi Pensiun Bumiputera John Hancock

AHP Acquisition Corp.

British American Life & General Insurance Berhad

K&N Kenanga SDN, Bhd.

First Signature Bank & Trust Co.

Energy Investors Management, Inc.

JHM Capital Corp.

Capital Growth (Bermuda) Mngmt. Co., Ltd.

John Hancock Advisers International, Ltd.

Sudler and Company, n/k/a Sudler Marling, Inc., and General Parking Corporation state that each has no parent company or subsidiary companies.

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, John Hancock Mutual Life Insurance Company, Sudler and Company, n/k/a Sudler Marling, Inc., and General Parking Corporation, respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Court of Appeals for the Seventh Circuit's two orders in this case. The Court of Appeals' orders: (1) dismissed for want of prosecution the Petitioners' appeal from an order of the U.S. District Court, Northern District of Illinois, Eastern Division, dismissing the Petitioners' action for want of prosecution; and (2) denied the Petitioners' petition for rehearing of that prior order.

OPINIONS BELOW

The Court of Appeals issued an order on May 10, 1991 dismissing for want of prosecution the Petitioners' appeal from the orders of the U.S. District Court, Northern District of Illinois, Eastern Division, dated June 26, 1990, March 14, 1990, April 16, 1990, August 3, 1990, June 6, 1990, and June 12, 1990 (Petitioners' Appendix 5-6). The Court of Appeals dismissed the Petitioners' appeal for want of prosecution pursuant to the court's prior order of April 25, 1991, in which the court ordered the Petitioners to file their brief by May 3, 1991 or face dismissal of their appeal.

The Court of Appeals issued a second order on June 7, 1991. This Order denied the Petitioners' Petition for Rehearing with Suggestion of Rehearing En Banc of the prior order of May 10, 1991 (Petitioners' Appendix 3-4). In this order, the Court of Appeals noted that the Petitioners had made no attempt to file a brief, despite their numerous other filings offered to the court.

The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated June 26, 1990, dismissed the Petitioners' cause of action for want of prosecution (Petitioners' Appendix 17). The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated August 3, 1990, referred the Petitioners' motion to vacate to a magistrate. The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated June 12, 1990, lifted all stays entered in the case and set forth briefing schedules. The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated June 6, 1990, denied

the Petitioners' emergency objection to a status hearing request for ruling on pending motion for stay of proceedings. The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated April 18, 1991, referred the case to a magistrate. The order of the U.S. District Court for the Northern District of Illinois, Eastern Division, dated March 14, 1990, set forth a briefing schedule on the Petitioners' motion for stay of proceedings.

None of the Court of Appeals' or District Court's orders are reported.

JURISDICTION

The order of the Court of Appeals was entered on May 10, 1991. Rehearing was denied on June 7, 1991. On August 28, 1991, the Petitioners obtained an extension of time until November 4, 1991 in which to file a Petition for Writ of Certiorari. The Petitioners filed their Petition on November 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 3. Appeal as of Right—How Taken.

> (a) *Filing the Notice of Appeal.* An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. . . .

Federal Rule of Appellate Procedure 31. Filing and Service of Briefs. . . .

> (c) *Consequence of Failure to File Briefs.* If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. . . .

Circuit Rule 31. Filing of Briefs and Failure to Timely File Briefs. . . .

> (c) *Failure of Appellant to File Brief.* When an appellant's original brief is not filed when it is due, the procedure shall be as follows: . . .
>
> (2) *All Other Cases.* The clerk shall enter an order directing counsel, or a pro se appellant, to show cause why the appeal should not be dismissed. The court will then take appropriate action. . . .

STATEMENT OF THE CASE

A. Procedural Background Of The Litigation.

On August 24, 1990, the Petitioners filed their Notice of Joint Appeal to the U.S. Court of Appeals for the Seventh Circuit from the order entered by the U.S. District Court on June 27, 1990 dismissing the Petitioners' case for want of prosecution. The Petitioners had obtained an extension of time on July 18, 1990 in which to file their Notice of Joint Appeal, until August 24, 1990. The U.S. Court of Appeals for the Seventh Circuit had jurisdiction over this appeal pursuant to 28 U.S.C. §1291. This appeal was docketed in the U.S. Court of Appeals for the Seventh Circuit on August 28, 1990 under case no. 90-2888. The Seventh Circuit, on September 11, 1990, set forth a briefing schedule and set a due date for the Petitioners' appellants' brief on or before October 26, 1990.

On October 24, 1990, the Petitioners filed a motion to extend the time in which to file their appellants' brief. The Seventh Circuit granted this motion and ordered the appellants' brief to be filed on December 14, 1990.

On December 17, 1990, the Petitioner Frank L. Whitmer filed a motion for stay of proceedings or a time extension to obtain [sic] a petition for certiorari or to seek emergency medical care. On January 7, 1991, both Petitioners filed a supplemental emergency motion seeking the same relief. On January 10, 1991, the Seventh Circuit granted this second motion for extension and entered an order ordering briefing to be held in abeyance pending ruling on the Petitioners' motion for stay. On January 14, 1991, the Petitioners filed an emergency motion to hold ruling on their pending motion to stay until or after January

21, 1991. On January 23, 1991, the Petitioners filed an emergency motion to sanction and strike the Defendants-Appellees' responses to the Petitioners' emergency motion for stay of proceedings and/or time extension.

On January 25, 1991, the Seventh Circuit entered an order denying the Petitioners' motion for sanctions and motions for stay. The order further noted that the Petitioners' brief was originally due on October 10, 1990. The Seventh Circuit also, in its order, set forth a second briefing schedule and ordered that the Petitioners' brief be filed on or before February 25, 1991.

On February 8, 1991, one of the Respondents, Skidmore, Owings and Merrill, filed a motion to dismiss the case for lack of jurisdiction. On February 8, 1991, the Seventh Circuit issued an order holding briefing in abeyance and on March 15, 1991, the Seventh Circuit entered an order dismissing the appeal for lack of jurisdiction. On March 29, 1991 the Petitioners filed a petition for rehearing of this order. On April 22, 1991, the Petitioners filed a motion to stay or delay proceedings and due dates until after their filing of a Petition for Writ of Certiorari in a different case which was due on May 3, 1991. On April 25, 1991, the Seventh Circuit entered an order vacating the prior dismissal order and reinstating the appeal. The Seventh Circuit further ordered that the Petitioners file their brief by May 3, 1991. The order also provided that the Petitioners' failure to do so would result in the dismissal of the case pursuant to Circuit Rule 31(c)(2). Also on April 25, 1991, the Seventh Circuit issued an order denying the motion for stay or delay of proceedings and ordered the opening brief to be filed on May 3, 1991.

On April 30, 1991, the Petitioners filed a motion to amend portions of the April 25, 1991 order and for a brief

postponement. On May 2, 1991, the Seventh Circuit issued an order denying this motion and again ordered the Petitioners to file their brief on May 3, 1991. The order further provided that failure to file a brief by that date would result in dismissal of the appeal for want of prosecution.

On May 6, 1991, the Petitioners filed a motion to hold briefing in abeyance pending resolution of the District Court's order regarding the Petitioners' motion for statement or memorandum of the District Court's inclination to grant relief under Federal Rule of Civil Procedure 60(b). On May 10, 1991, the Seventh Circuit issued an order denying this emergency motion. The order also provided that the Petitioners' appeal was dismissed for want of prosecution due to the Petitioners' failure to file their brief by May 3, 1991.

On May 24, 1991, the Petitioners filed a Petition for Rehearing with Suggestion for Rehearing En Banc. On May 28, 1991, the Petitioners filed a motion for sanctions. On June 7, 1991, the Seventh Circuit issued an order denying the Petitioners' Petition for Rehearing. On June 13, 1991, the Seventh Circuit issued an order denying the Petitioners' motion for sanctions.

B. Issues Presented By The Petitioners Which Are Not Before This Honorable Court.

The Petitioners' "Questions Presented" section of their Petition lists nine questions, only five of which, Questions number 4 through 7 and Question number 9, are arguably before this Court. The only issues arising from the U.S. Court of Appeals for the Seventh Circuit's orders are: (1) whether the Court of Appeals properly dismissed the Petitioners' appeal for want of prosecution due to the Petitioners' failure to timely file their appellants' brief, and

(2) whether the Court of Appeals complied with its own Circuit Rule 31(c)(2) before dismissing the Petitioners' appeal.

The other questions presented by the Petitioners are not addressed by the Court of Appeals' orders and are, therefore, not before this Court. In addition, Question number 8 is unintelligible.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Petitioners argue many points, only two of which are before this Court and none of which approach the kind of important constitutional or policy question which this Court should exercise its discretion to hear. Furthermore, the only issues before this Court, whether the Court of Appeals properly dismissed the Petitioners' appeal for want of prosecution and followed its own Circuit Rule prior to dismissal, do not present issues which involve a conflict in the decisions of the U.S. Courts of Appeals.

I.

THERE IS NO CONFLICT AMONG THE U.S. COURTS OF APPEALS ON THE QUESTION OF WHETHER A COURT OF APPEALS CAN DISMISS AN APPEAL PURSUANT TO THE FEDERAL RULES OF APPELLATE PROCEDURE FOR AN APPELLANT'S FAILURE TO TIMELY FILE ITS BRIEF. ALL OF THE U.S. COURTS OF APPEALS WHICH HAVE ADDRESSED THIS ISSUE HAVE HELD THAT A COURT OF APPEALS IS AUTHORIZED TO DISMISS AN APPEAL FOR WANT OF PROSECUTION DUE TO AN APPELLANT'S FAILURE TO TIMELY FILE ITS BRIEF.

A review of the decisions of the U.S. Courts of Appeals which have addressed the issue, the Courts of Appeals for the District of Columbia, First, Second, Third, Fifth, Seventh, Eighth and Ninth Circuits, shows that all have held that a Court of Appeals is authorized to dismiss an appeal for want of prosecution. Since there is no conflict among the Courts of Appeals on this issue, therefore, there is no basis for this Honorable Court to exercise its judicial discretion under Supreme Court Rule 10. Therefore, this Honorable Court should deny the Petitioners' Petition for Writ of Certiorari.

Federal Rule of Appellate Procedure 3(a) provides that failure of an appellant to take any step other than the timely filing of a notice of appeal is a ground for such action as the Court of Appeals deems appropriate, which may include dismissal of the appeal. Federal Rule of Appellate Procedure 31(c) provides that if an appellant fails to file a brief within the time provided by the rule or within the time as extended, an appellee may move for dismissal of an appeal. The particular U.S. Courts of Appeals and their holdings on the issue of whether a Court of Appeals is authorized to dismiss an appeal are set forth below:

D.C. Circuit: *Barber v. American Security Bank*, 841 F.2d 1159, 1162 (D.C. Cir. 1988) (counsel's failure to file his brief on time and failure to file the proper motions warranted dismissal). *See also Julien v. Zeringue*, 864 F.2d 1572, 1575 (Fed.Cir. 1989) (failure to comply with the court's rules, including requirements for preparing and filing of briefs, appendices and other papers, may result in dismissal for failure to prosecute).

First Circuit: *See Larkin v. United Association of Journeyman*, 338 F.2d 335, 336 (1st Cir. 1964); *cert. denied*, 380 U.S. 975, 85 S.Ct. 1337 (1965) (appeal dismissed for want of prosecution due to *pro se* appellant's failure to file adequate brief).

Second Circuit: *Gilroy v. Erie Lackawanna Railroad Co.*, 421 F.2d 1321, 1323 (2d Cir. 1970) (court sanctioned appellant for failing to prosecute appeal and directed the clerk to dismiss the appeal if the appellant failed to docket the record and file the brief and appendix within 30 days).

Third Circuit: *Davis v. Smith*, 253 F.2d 286, 288 (3d Cir. 1958) (appellant's failure to take any steps to prosecute an appeal including filing a brief warranted dismissal of that appeal).

Fifth Circuit: *Tidwell v. Dees*, 464 F.2d 1297, 1298 (5th Cir. 1972) (dismissal of a *pro se* appeal pursuant to Federal Rule of Appellate Procedure 31 due to the appellant's failure to file a brief). *See also Jackson v. Hensley*, 484 F.2d 992 (5th Cir. 1973).

Seventh Circuit: *Stotler & Co. v. Able*, 837 F.2d 1425, 1427-1428 (7th Cir. 1988) (appeal dismissed pursuant to Federal Rule of Appellate Procedure 31 due to the appellant's failure to file a timely brief). *See also Instituto Nacional de Comercializacion Agricola v. Continental Illinois National Bank and Trust Co.*, 858 F.2d 1264 (7th Cir. 1988).

Eighth Circuit: *See Slack v. St. Louis County Government*, 919 F.2d 98, 99-100 (8th Cir. 1990) (dismissal of appellant's appeal due to appellant's brief not being in compliance with the Federal Rules of Appellate Procedure).

Ninth Circuit: *Escobar-Ramos v. Immigration and Naturalization Service*, 927 F.2d 482, 485 (9th Cir. 1991) (Federal Rule of Appellate Procedure 31 provides for appellee moving to dismiss an appeal if an appellant fails to file a brief). *See also Guam Sasaki Corp. v. Diana's, Inc.*, 881 F.2d 713 (9th Cir. 1989).

There is no conflict among the U.S. Courts of Appeals that a Court of Appeals is authorized to dismiss an appeal for want of prosecution. In addition, in the instant case, the Petitioners' appellants' brief was originally due to be filed on October 26, 1991. The Seventh Circuit granted the Petitioners two extensions of time in which to file their Brief and also held briefing in abeyance twice. The Seventh Circuit then reset the due date for the appellants' brief, after reinstating the Petitioners' appeal, to May 3, 1991, which was more than six months after the Petitioners were originally required to file their appellants' brief. The Petitioners were given ample time in which to prosecute their appeal and the Seventh Circuit was authorized to dismiss the Petitioners' appeal for want of prosecution.

II.

THE U.S COURT OF APPEALS FOR THE SEVENTH CIRCUIT FOLLOWED ITS OWN CIRCUIT RULE 31(c)(2) PRIOR TO DISMISSAL OF THE PETITIONERS' APPEAL.

The U.S. Court of Appeals for the Seventh Circuit's Circuit Rule 31(c)(2) provides that when an appellant's original brief is not filed when due, the clerk shall enter an

order directing counsel or a *pro se* appellant to show cause why the appeal should not be dismissed. The court will then take the appropriate action after entry of such an order. Contrary to the Petitioners' argument, the U.S. Court of Appeals for the Seventh Circuit followed its own procedure prior to dismissal of the Petitioners' appeal. The Seventh Circuit's order dated April 25, 1991 stated as follows:

> "It is further ordered that appellants file their opening brief and short appendix by 5/3/91. *Failure to do so will result in the dismissal of this case pursuant to C.R. 31(c)(2)*" (emphasis added).

The Seventh Circuit entered a second order on May 2, 1991, indicating that failure of the Petitioners to file a brief by May 3, 1991 would result in dismissal of the appeal for failure to prosecute. The Seventh Circuit did not enter its dismissal order until May 10, 1991.

In addition, even assuming that the Court of Appeals did not follow its own procedure as set forth in Circuit Rule 31(c)(2), this is irrelevant. The Petitioners were given ample warning on more than one occasion that their appeal would be dismissed for want of prosecution if they failed to timely file their appellants' brief. *See Instituto Nacional v. Bell*, *supra*, wherein the court held it was immaterial that the clerk did not enter an order to show cause when an appellee failed to file its brief. *Instituto Nacional*, *supra*, 858 F.2d at 1271.

CONCLUSION

The only issues before this Honorable Court are: (1) whether there is a conflict among the U.S. Courts of Appeals on the issue of whether a Court of Appeals is authorized to dismiss an appeal for want of prosecution pursuant to the Federal Rules of Appellate Procedure and (2) whether the U.S. Court of Appeals for the Seventh Circuit followed its own Circuit Rule. There is no conflict among the U.S. Courts of Appeals on these issues. The issues raised by the Petitioners are plainly without merit. The Petition should be denied forthwith.

Respectfully submitted,

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Dated: December, 1991